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No. 92-555

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

WILLIAM PAUL,
Petitioner

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

Respondent is Missouri Pacific Railroad Company. For purposes of Rule 29.1, Missouri Pacific Railroad Company operates a joint railway system with Union Pacific Railroad Company. Both Union Pacific Railroad Company and Missouri Pacific Railroad Company are indirect, wholly owned subsidiaries of the Union Pacific Corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In this case, the petitioner alleged in his Complaint that he had incurred a bilateral, noise induced hearing loss due to the negligence of the respondent. As pointed out by the District Judge in opening the case (Tr. 8), the claims at trial were that the petitioner had only suffered a unilateral hearing loss with a very mild loss in the left ear. The evidence at trial demonstrated that the hearing in the plaintiff's right ear was normal. In his statement of the case, the petitioner omits a discussion of the medical evidence supporting the conclusion that the

petitioner's hearing loss was caused by the failure of the petitioner to use hearing protection while hunting.

The only medical evidence submitted in this case was the testimony of Dr. John R.E. Dickins, a Little Rock, Arkansas otolaryngologist who examined the petitioner at the request of the petitioner's attorney. The audiometric testing done by Dr. Dickins demonstrated that the petitioner had sustained a mild high frequency hearing loss in his left ear, but that petitioner had normal hearing at all frequencies in his right ear. As Dr. Dickins testified, the audiometric pattern was atypical of occupational noise inducing hearing loss and was consistent with and more typical of hearing loss caused by gunfire. As he further indicated, use of a firearm over time results in a unilateral loss initially detected in the high frequencies. If a hunter is right handed (such as the petitioner), the hearing loss will exhibit itself in the left or opposite ear.

Petitioner testified that he wore hearing protection while using a four wheel vehicle at home. (Tr. 181) He claimed he was not aware that gun ammunition boxes contain warnings to utilize hearing protection. (Tr. 187) Yet, he claimed that he sometimes wore hearing protection while using his firearms. (Tr. 187) Petitioner described himself as a "semi collector" who owns twelve guns. (Tr. 193)

In his appeal to the Eighth Circuit, the petitioner did not challenge the sufficiency of the evidence regarding petitioner's lack of due care in protecting his hearing while hunting. Instead, the petitioner challenged the submission of the contributory negligence instruction as a matter of law.

REASONS FOR DENYING THE WRIT

THE DECISION BY THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT IS NOT CONTRARY TO ANY DECISION BY THE SUPREME COURT OR A COURT OF APPEALS

Petitioner seeks to argue that the remedial nature of the Federal Employers Liabiiity Act, 45 U.S.C. § 51 *et seq.*, when combined with the number of actions brought under the Act, necessitates a review of this decision. Respectfully, respondent submits that the Petition for Writ of Certiorari should be denied in that the decision by the Court of Appeals for the Eighth Circuit is not in conflict with any decision by this Court or any Court of Appeals. Petitioner admits as much at Page 17 of his Petition. Indeed, the Court of Appeals below recognized that, "The parties have not presented, nor has our research revealed, a case that addresses the definition of contributory negligence in a fact situation similar to this one." *Paul v. Missouri Pacific R. Co.*, 963 F.2d 1058, 1060 (8th Cir. 1992). The Court of Appeals correctly analyzed the distinction between a sudden, isolated event giving rise to an FELA claim and a long term occupational illness claim brought under the FELA.

45 U.S.C. § 53 (1982) states:

> [T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

In the case at bar, the jury was instructed on the elements of contributory negligence as well as the method of determining or diminishing damages if it found that the petitioner was contributorily negligent.[1] The jury returned a general verdict in favor of the respondent.

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[1] Instruction No. 12—Affidmative Defense—Elements of Contributory Negligence. You must find the plaintiff contributorily

It is well established that "[W]hether an instruction on contributory negligence is proper in FELA cases depends upon the facts of the particular case . . . . A defendant is entitled to such an instruction to the jury if there is any evidence to support that theory." *Meyers v. Union Pacific*, 738 F.2d 328, 331 (8th Cir. 1984); see also, *Wilson v. Burlington Northern*, 670 F.2d 780 (8th Cir. 1982), *cert. den.*, 457 U.S. 1120. There can be little doubt that a reasonable person could conclude that Petitioner failed to exercise due care for his own condition resulting in hearing loss.

Petitioner references by footnote the decision in *Taylor v. Burlington Northern Railroad Company*, 787 F.2d 1309 (9th Cir. 1986) as including "dicta" that evidence of drug use may bear on the issue of contributory negligence. Taylor brought an action against his former employer Burlington Northern Railroad under the FELA alleging that harassment by a Burlington Northern foreman caused Taylor to suffer paranoid schizophrenia. The

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negligent if the defendant has proved all of the following elements by the preponderance of the evidence: First, the plaintiff failed to protect himself from exposure to harmful noise in his recreational activities; second, the plaintiff was thereby negligent; and third, such negligence of the plaintiff directly contributed to causing his injury. If any of the above elements have not been proved by the preponderance of the evidence, then the plaintiff was not contributorily negligent.

Instruction No. 14—Diminishing Damages Because of Contributory Negligence. If you find the plaintiff contributory negligent according to the Court's previous instructions, then you must diminish the [sic] any sum awarded in proportion to the amount of the negligence attributable to the plaintiff, and assess damages in the following manner: First, determine the amount of plaintiff's damages without reference to the question of his negligence; second, decide what proportion or percentage of the total combined negligence of both parties causing the injury consistent of the plaintiff's negligence; third, reduce by this proportion or percentage the amount of damages you would have awarded had the plaintiff's negligence not contributed to the injury.

District Court had refused to instruct the jury on comparative negligence. The Court of Appeals for the Ninth Circuit reversed and remanded the judgment of the District Court and concluded that the District Court had abused its discretion in refusing to give an instruction on comparative negligence. In addressing whether the plaintiff's own conduct, including drug use, was admissible, then Judge Kennedy wrote, "To the extent it was admissible, it may have borne on Taylor's contributory negligence. Taylor's own lack of due care for his own condition may have reduced Burlington's liability, and the jury should have been allowed to consider whether Taylor acted without due care." 787 F.2d at 1314.

CONCLUSION

The Eighth Circuit's opinion correctly affirmed the District Court's submission of contributory negligence in this case. Petitioner can demonstrate no conflict with other judicial decisions nor an explicit conflict with the language of the federal statute.

Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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